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IN THE
SUPREME COURT OF THE UNITED STATES
November Term, 1975

No. 75-749

JIMMY AUSTIN NORRIS, Petitioner

v.

STATE OF NORTH CAROLINA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE NORTH CAROLINA COURT OF APPEALS

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November , 1975

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IN THE
UPREME COURT OF THE UNITED STATES
November Term, 1975

NO. _____

MMY AUSTIN NORRIS, Petitioner

V.

TATE OF NORTH CAROLINA, Respondent

ETITION FOR WRIT OF CERTIORARI TO
HE NORTH CAROLINA COURT OF APPEALS

The petitioner, Jimmy Austin Norris, re-
pectfully prays that a Writ of Certiorari issue
review the judgment and opinion of the North
arolina Court of Appeals entered in this pro-
eding on June 18, 1975.

OPINION BELOW

The opinion of the North Carolina Court of
ppeals is reported in 26 N.C. Appeals 259,
5 S.E. 2d 857 . The full text of the
inion of the Court of Appeals appears in
ppendix B of this Petition.

JURISDICTION

The judgment of the North Carolina Court of Appeals was entered on June 18, 1975. A timely Notice of Appeal and Petition for Writ of Certiorari was filed with the North Carolina Supreme Court on July 9, 1975 and was dismissed and denied by the North Carolina Supreme Court on the 25th day of August, 1975. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

DID THE TRIAL JUDGE'S COMMENTS DENY THE DEFENDANT'S RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment XIV, 1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or

property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This is a criminal action wherein the defendant Jimmy Austin Norris was tried on two (2) warrants charging him with driving under the influence of intoxicating liquors and with hit and run. A trial was held on September 27, 1974, in Wake County District Court at which time the defendant was found guilty as charged in the warrants.

Upon his being arraigned at the Second December 1974 Regular Criminal Session of the Wake County Superior Court, the defendant entered a plea of not guilty to both charges. Thereupon, the State offered evidence at the end of which the defendant moved for dismissal as judgment of nonsuit. This motion was denied. The defendant did not offer evidence. Following argument of counsel, the Court instructed the jury and after retiring, the jury returned a verdict of guilty to the charge of driving under the influence and guilty as to the charge of hit and run.

Defendant made a motion to set aside the verdict, the motion was denied. The trial judge consolidated the judgments and entered judgment that the defendant Jimmy Austin Norris be imprisoned for a term of six (6) months in the Wake County Jail, to be assigned to the North Carolina

Department of Corrections. Thereupon, the defendant gave notice of appeal to the North Carolina Court of Appeals in open Court. Upon affirmation of the trial court's verdict by the North Carolina Court of Appeals, the defendant petitioned the North Carolina Supreme Court for issuance of a Writ of Certiorari and gave notice of appeal to the North Carolina Supreme Court. By Order dated August 25, 1975, the North Carolina Supreme Court dismissed the appeal and denied the Petition for Writ of Certiorari, without opinion.

REASONS FOR GRANTING THE WRIT

I. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT GUARANTEES TO EACH DEFENDANT ACCUSED OF A CRIMINAL OFFENSE THE RIGHT TO BE HEARD BEFORE AN IMPARTIAL TRIBUNAL.

The overriding question to be decided upon this appeal is whether the defendant's absolute right to a fair trial before an impartial judge and unprejudiced jury was denied in violation of the Fourteenth Amendment of the United States Constitution by the conduct of the trial judge. The principle involved in this appeal is not new; nor is it susceptible of difficulty in this application. Defense does not present a novel legal theory to the Court for its review but rather brings before it the constitutional guarantee of a right to a fair trial, a basic and fundamental right of ancient origin. Few have expressed the concept involved in this principle

as well as Chief Justice Russell of the State of Georgia when he spoke for that Court:

> "In the Bill of Rights which the people themselves set up for our Government as well as their own, it is declared that 'no person shall be deprived of life, liberty or property except by due process of law, (citations omitted); that no person shall be deprived of the right to prosecute or defend his own cause in any of the Courts of the State in person, by attorney or both'. From the time when at Runnymede, almost seven centuries ago, King John placed his signature on the Magna Charta, until the present day, it has been the habit of English speaking people to deprive a fellowman of his liberty only after a fair trial by an impartial jury and after their verdict finding him guilty of the offense charged. And the Magna Charta was not a new pronouncement of our rights, but a reiteration of the immemorial law of the land. A fair trial means one in which there shall be no bias or prejudice for or against the accused, and in which not only the witness chair and the jury box, but THE COURTHOUSE ALSO SHALL BE PURGED OF EVERY SUSPICIOUS CIRCUMSTANCES TENDING TO TAKE THE ACCUSED ANY OF THE RIGHTS GIVEN TO HIM BY THE LAW." (Emphasis ours). Robinson v. State, 6 Ga. 696, 706-707, 65 S. E. 792 (1909).

The defendant contends that remarks made by the trial judge to defense counsel, during the voir dire hearing and out of the presence of the jury indicates an antagonistic attitude by the trial judge to the defendant's position. Also, remarks made in the presence of the jury clearly conveyed to the jury the trial judge's opinion of the defendant's legal position operating to discredit and prejudice the accused in his cause to the jury. So operating, the remarks violated the Fourteenth Amendment of the United States Constitution.

It is without contention that the United States Constitution guarantees to each litigant and each defendant accused of a criminal offense the right to be heard before an impartial tribunal. This is the minimum guarantee of due process as embodied in the Fourteenth Amendment.

II. THE MINIMUM STANDARD OF FAIR TRIAL REQUIRED BY THE UNITED STATES CONSTITUTION WAS NOT MET BY THE NORTH CAROLINA COURTS.

The standard the defendant contends should be applied to the case at hand is not one of exact measurement. Indeed the United States Supreme Court has noted that each State is free to regulate its courts in accordance with its own conception of policy unless in so doing it offends some principle of justice so rooted in the traditions and the conscience of the American people as to be deemed fundamental. See Snyder v. Massachusetts, 291 U.S. 97, 78 L. Ed. 674, 54 S. Ct. 330 (1933). The defendant concedes that in

the case at bar it is within the province of the State to enforce those standards which it finds are necessary and sufficient to protect the accused. The defendant, however, asserts that remarks made by the judge indicate the minimum standard required by the United States Constitution was not met and that the standard evidenced by the Record on Appeal was violative of the rights guaranteed under the concept of due process.

Due process requires that the proceeding be fair. In an appeal taken from the Circuit Court of Appeals from the Eastern District of North Carolina, the United States Supreme Court stated:

> "It is the duty of the presiding judge either of his own motion or upon request of the opposing party or his counsel to interpose and check the party or his counsel in an improper or prejudicial kind of argument. The duty is a very plain one and good care should be taken to discharge it fully and faithfully." Sawyer v. United States, 202 U.S. 150, 155 50 L. Ed. 972, 974 (1905).

Similarly, it is the duty and office of the presiding judge to temper his own remarks; and in fact refrain from comment when the rights afforded the accused would otherwise be impaired.

Shortly after the trial had started, the trial judge excused the jury to conduct a voir dire hearing concerning the admissibility of the defendant's statements made to the arresting officer. Upon timely objection, the trial judge responded: "Now, you're entitled to your voir dire. Ladies and Gentlemen of the jury, I will let you go to your jury room if you will FOR JUST A MINUTE." (Own emphasis) (Record Page 16).

The second similar remark in the presence of the jury occurred at the completion of the State's evidence as the defendant's attorney made a motion for judgment as of nonsuit. The following dialogue between defense counsel and the trial judge took place:

> MR. BARROW: "Your Honor, I'd like to be heard on a motion, if I could at this time out of the presence of the jury."
>
> COURT: "You want to be heard on it?"
>
> MR. BARROW: "I would like to, yes sir, for the purpose of the record."
>
> COURT: "Ladies and Gentlemen, I'LL HAVE TO LET YOU GO TO YOUR JURY ROOM AGAIN. IT WON'T BE LONG. I DON'T KNOW AS HOW I WOULD LIGHT UP A CIGARETTE." (own emphasis) (Record Page 23).

The tenor and manner of the judge in making

the comments can be felt by also noting the other comments made to counsel:

JURY ABSENT

COURT: "You serious about a motion?"

MR. BARROW: "Yes sir, I would like to make a motion for nonsuit and like to be heard on it."

COURT: "All right I'll listen to you, but I can't imagine what you're going to say. Go ahead." (Record Page 24).

(ARGUMENT BY MR. BARROW)

COURT: "There's not any sense in that so it's denied. Bring them back. There ain't any sense in that." (Record Page 26).

Additionally, during the voir dire hearing out of the presence of the jury, the trial judge made the following comment concerning the admissibility of the defendant's statement:

COURT: "I believe I will exclude the evidence on that account, but I will let you ask him that question and then I will exclude it. NOW WHILE THE JURY IS OUT, I THINK YOU MIGHT AS WELL KNOW IF THE JURY FINDS THIS MAN GUILTY, I'M GOING TO PUT HIM IN PRISON. YOU OUGHT TO THINK ABOUT

THAT BETWEEN NOW AND THE TIME WE FINISH THE CASE." (own emphasis) (Record Pages 18-19).

The cumulative effect of the comments noting the tenor, made by the judge in the presence of the jury was disparaging of defense counsel. Remarks were thereby improper and the cause of the defendant was thereby impaired as his legal position was openly questioned before the jury.

The standard in determining whether the improper remarks were prejudicial under the United States Constitution is whether they might have influenced the jury. It is not incumbent upon the accused to show actual prejudice, but rather to show that the improper conduct may have influenced the jury's verdict. In Young v. United States, 346 F. 2d 793 (1965), defense counsel was accused, in the presence of the jury, of having "argued back to the Court" and that counsel lacked "good Court manners and urbanity". The judge remarked "you just want to be nasty to cast imputations on the police force. Now stop doing that...You owe that police officer an apology really." There the Court reversed the conviction of the defendant noting the standard to be whether the remarks by the judge "may have been prejudicial to the defendants notwithstanding the strong evidence against (them)."

The defendant contends that under such a standard as required by the United States

Constitution, the verdict of the trial court and its affirmation by the Court of Appeals must be reversed and remanded for further proceedings.

CONCLUSION

For reasons stated herein a Writ of Certiorari should issue to review the judgment and the opinion of the North Carolina Court of Appeals.

Respectfully submitted,

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November , 1975

APPENDIX A

EXCERPTS FROM RECORD INDICATING QUESTIONS RAISED BELOW

(From Record Page 16)

(Upon timely objection concerning the admissibility of the defendant's statements to the arresting officer, the trial judge responded as follows:)

Now you're entitled to your voir dire. Ladies and Gentlemen of the jury, I will let you go to your jury room, if you will, for just a minute.

EXCEPTION. EXCEPTION NO. 1

(From Record Pages 18-19)

(During the voir dire hearing out of the presence of the jury the trial judge made the following comment concerning the admissibility of the defendant's statement:)

I believe I will exclude the evidence on that account, but I will let you ask him that question and then I will exclude it. Now while the jury is out, I think you might as well know if the jury finds this man guilty, I'm going to put him in prison. You ought to think about that between now and the time we finish the case.

EXCEPTION. EXCEPTION NO. 4

(From Record Page 23)

(In the presence of the jury and at the completion of the State's evidence the following dialogue took place between defense counsel and the trial judge:)

MR. BARROW: Your Honor, I'd like to be heard on a motion, if I could at this time out of the presence of the jury.

COURT: You want to be heard on it?

MR. BARROW: I would like to, yes sir, for the purpose of the record.

COURT: Ladies and Gentlemen, I'll have to let you go to your jury room again. It won't be long. I don't know as how I would light up a cigarette.

EXCEPTION. EXCEPTION NO. 6

(From Record Pages 24 and 26)

(Out of the presence of the jury upon the completion of the State's evidence following a motion for dismissal, the following dialogue took place between the trial judge and defense counsel:)

COURT: You serious about a motion?

MR. BARROW: Yes sir, I would like to make a motion for nonsuit and like to be heard on it.

COURT: All right I'll listen to you, but I can't imagine what you're going to say. Go ahead.

EXCEPTION. EXCEPTION NO. 8

(ARGUMENT BY MR. BARROW)

****

COURT: There's not any sense in that so its denied. Bring them back. There ain't any sense in that.

EXCEPTION. EXCEPTION NO. 9

(From Record Page 39)

(On Appeal, the Petitioner grouped his exceptions and assigned error as follows:)

1. ASSIGNMENT OF ERROR NO. 1

The trial judge erred in its comment to the jury by expressing an opinion that the defendant's position was unsound and thereby prejudiced the accused and his cause with the jury.

EXCEPTION NOS. 1 (R p 16); 6 (R p 23); 7 (R p 24); 8 (R p 24); 9 (R p 26)

2. ASSIGNMENT OF ERROR NO. 2

The trial judge erred in its conduct and language which tended to prejudice the accused

and denied his absolute right to a fair trial before an impartial judge.

EXCEPTION NOS. 2 (R p 17); 3 (R p 18); 4 (R p 19); 5 (R p 19); 6 (R p 23); 8 (R p 24); 9 (R p 26)

APPENDIX B

TEXT OF OPINION BELOW

No. 7510SC204 Tenth District

NORTH CAROLINA COURT OF APPEALS
Filed: 18 June 1975

STATE OF NORTH CAROLINA

v. From Wake

JIMMY AUSTIN NORRIS

APPEAL by defendant from Bailey, Judge. Judgment entered 19 December 1974 in Superior Court, Wake County. Heard in the Court of Appeals 8 May 1975.

Upon conviction in District Court, defendant was tried in Superior Court on two warrants charging him with operating a motor vehicle on a public street, highway or vehicular area while under the influence of intoxicating liquor and with failing to stop at an accident which resulted in property damage, in violation of G.S. 20-166(b).

Bill Rawls testified for the State that on 15 June 1974, between 1:30 and 2:00 a.m., he saw a large dark automobile run into a Vega automobile, parked on Park Avenue 15 or 20 feet from the porch where he stood, and continue down the street. Jeffery Billheimer

identified the Vega as his and testified that it was undamaged when he parked it in front of his house on the night in question. He later observed that the vehicle had been pushed into a telephone pole causing damage front and rear. A neighbor, David Batt, testified that on 15 June 1974, between 1:30 and 2:00 a.m., he heard a crash, ran outside, and saw a late model automobile on Park Avenue proceeding toward Hollsborough Street. He gave a description of the vehicle and the license plate number to Officer G. L. Mack who came to investigate the incident.

Officer Mack testified that shortly after responding to the call he saw Jimmy Austin Norris, operating a Lincoln Continental, back into another vehicle in the parking lot of the Hilton Inn on Hillsborough Street. He stopped Norris and, observing his condition, placed him under arrest for driving under the influence. Norris refused to take the breathalyzer test. Officer Mack's description of the damage to Norris's vehicle and the license plate number corresponded with those given by the witness Batt.

Defendant offered no evidence, and the jury found him guilty as charged. From judgment imposing a prison sentence, defendant appealed to this Court.

Attorney General Edmisten, by Associate Attorney General Jerry J. Rutledge, for the State.

H. Spencer Barrow, for defendant appellant.

ARNOLD, JUDGE

Defendant assigns error to the trial court's denial of his motions for judgment as of nonsuit on grounds of variance. He contends that the statute creates two distinct offenses, one dealing with occupied vehicles and the other dealing with parked or unattended vehicles, and that the warrant charged him with the former while the evidence supported the latter. We disagree.

G.S. 20-166 provides in part as follows:

"Duty to stop in event of accident or collision; furnishing information or assistance to injured person, etc.; persons assisting exempt from civil liability.

. . . .

(b) The driver of any vehicle involved in an accident or collision resulting in damage to property and in which there is not involved injury or death of any person shall immediately stop his vehicle at the scene of the accident or collision and shall give his name, address, operator's or chauffeur's license number and the registration number of his vehicle to the

> driver or occupants of any other vehicle involved in the accident or collision or to any person whose property is damaged in the accident or collision; provided that if the damaged property is a parked and unattended vehicle and the name and location of the owner is not known to or readily ascertainable by the driver of the responsible vehicle, the said driver shall furnish the information required by this subsection to the nearest available peace officer, or, in the alternative, and provided he thereafter within 48 hours fully complies with G.S. 20-166.1(c) (report to owner of parked or unattended vehicle), shall immediately place a paper-writing containing said information in a conspicuous place upon or in the damaged vehicle . . . ."

In our view the proviso merely withdraws the case of a parked or unattended vehicle whose owner's identity is not readily ascertainable from the general language of the statute. It does not describe a separate offense, and therefore it need not be negatived in the warrant. See State v. Abbott, 218 N.C. 470, 11 S.E. 2d 539 (1940); State v. Burton, 138 N.C. 576, 50 S.E. 214 (1905).

The statute requires that the driver of the responsible vehicle immediately stop at the scene and give certain identifying information. The driver violates the statute if he does not immediately stop at the scene. All of the evidence in this case tends to show that the

defendant failed to stop at or anywhere near the scene. Under these circumstances, the warrant's allegations that the defendant "did fail to . . . give his name, address, operator's lic. number and registration number of his vehicle to the driver and occupants of the other vehicle involved" would become relevant only if there was some evidence that he immediately stopped at the scene.

It is noted, however, that there is evidence that the damaged vehicle was parked in front of the home of the owner, who was present and may have been "readily ascertainable by the driver". If so, the defendant failed to give identifying information to the owner as alleged in the warrant. There is no variance requiring nonsuit.

Defendant's remaining assignments of error concern comments made by the court during the trial. G.S. 1-180 places a duty on the trial judge to be absolutely impartial. He is not to intimate his opinion in any way, but he is to insure a fair and impartial trial before a jury.

The challenged remarks in this case were made both in and out of the jury's presence. No useful purpose would be served by setting out all of them. The following exchange is illustrative:

'MR. BARROW: 'Your Honor, I'd like to be heard on a motion, if I could at this time out of the presence of the jury.'

COURT: 'You want to be heard on it?'

MR. BARROW: 'I would like to, yes sir, for the purpose of the record.'

COURT: 'Ladies and Gentlemen, I'll have to let you go to your jury room again. It won't be long. I don't know as how I would light up a cigarette.'

JURY ABSENT

COURT: 'You serious about a motion?'

MR. BARROW: 'Yes sir, I would like to make a motion for nonsuit and like to be heard on it.'

COURT: 'All right I'll listen to you, but I can't imagine what you're going to say. Go ahead.'

(ARGUMENT BY MR. BARROW)

COURT: 'There's not any sense in that so it's denied. Bring them back. There ain't any sense in that.'"

We do not approve of the judge's critical comments. Nevertheless, while these gratuitous statements before the jury were entirely unnecessary and improper, we do not find that their probable result was prejudicial to defendant. The "bare possibility" that defendant may have suffered prejudice is not enough to overturn a guilty verdict. See State v. Best, 280 N.C. 413, 186 S.E. 2d 1 (1972); State v.

Holden, 280 N.C. 426, 185 S.E. 2d 889 (1972); State v. Carter, 233 N.C. 581, 65 S.E. 2d 9 (1951); State v. Brooks, 15 N.C. App. 367, 190 S.E. 2d 338 (1972).

Defendant further challenges this statement by the judge: "Now while the jury is out, I think you might as well know if the jury finds this man guilty, I'm going to put him in prison. You ought to think about that between now and the time we finish this case." This comment came before the State had finished putting on evidence. It raises the question of whether the effective assistance of counsel was impaired.

The assistance of counsel for defendant is a right guaranteed by state and federal constitutions. Improper remarks or threats by trial judges which intimidate and frustrate lawyers could cost the accused effective use of counsel. See generally Annot., 62 A.L.R. 2d 166 (1958). From the record it is apparent that counsel was unintimidated by the court and continued a vigorous defense of his client. Although his efforts were unsuccessful, it cannot be said that he "trimmed his sails to the judicial wind that prevailed in the courtroom during the trial . . . ." Id. at 191.

We have examined all of defendant's assignments of error concerning comments by the court, and we have carefully examined the record. We find

No Error.

JUDGES MARTIN and CLARK concur.

APPENDIX D

APPEARANCE FORM

SUPREME COURT OF THE UNITED STATES

NO._____, November Term, 1975

JIMMY AUSTIN NORRIS, Petitioner

V.

STATE OF NORTH CAROLINA, Respondent

The Clerk will enter my appearance as Counsel for the Petitioner:

ROGER W. SMITH
300 Branch Bank Building
Raleigh, N.C. 27602

The Clerk is requested to notify counsel of action of the Court by means of Airmail Letter. The person to be notified for Petitioner is:

H. SPENCER BARROW
1213 Branch Bank Building
Raleigh, N.C. 27602

APPENDIX E

CERTIFICATE OF SERVICE

SUPREME COURT OF THE UNITED STATES

NO._____, November Term, 1975

JIMMY AUSTIN NORRIS, Petitioner

V.

STATE OF NORTH CAROLINA, Respondent

I hereby certify on this 21st day of November 1975, three copies of the Petition for Writ of Certiorari were personally delivered to Rufus L. Edmisten, Attorney General of North Carolina and Jerry J. Rutledge, Trial Attorney, Justice Building, Raleigh, North Carolina, for the Respondent, the State of North Carolina. I further certify that all parties required to be served have been served.

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